

2009

## State of Utah v. Antony Davis : Amicus Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. :  
ANTONY DAVIS, : Case No. 20090816-SC  
Defendant/Appellant. :

---

**BRIEF OF AMICUS SALT LAKE LEGAL DEFENDER ASSOC.**

Interlocutory appeal from trial court order denying Defendant's motion requiring Salt Lake County to pay the costs of an investigator and expert witnesses, entered by the Honorable Vernice Trease, Third District Court, Salt Lake Department, in and for Salt Lake County, State of Utah.

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**INTERESTS OF AMICUS SALT LAKE LEGAL DEFENDER ASSOCIATION**

The Salt Lake Legal Defender Association (LDA) contracts with Salt Lake County to represent criminal defendants who have been found to be indigent. This case, along with *State v. Parduhn*, Case No. 20090744-SC, and *State v. Jeffs*, Case No. 20090737-SC, raises the issue of whether Salt Lake County is required to provide a state-paid expert witness and/or investigator in the absence of a compelling reason for indigent criminal defendants who have declined to be represented by LDA. In another case pending before this Court, *Salt Lake Legal Defender Association v. Atherton*, District Court Case No. 081905753FS, Supreme Court Case No. 20100066-SC, LDA has filed a petition for extraordinary relief, seeking relief from a trial court order that not only requires Salt Lake County to pay for an expert, but also orders that LDA be the party responsible for paying the bill.

LDA has information pertinent to these issues. LDA is not contractually obligated

to pay for experts and investigators used by private attorneys, and has an interest in not being ordered by a court to pay the costs of retaining expert witnesses and/or investigators for indigent defendants who have chosen to proceed with private counsel. Additionally, LDA has an interest in not being placed in an impossible and costly ethical and practical position of being forced to act as co-counsel with private counsel who have been retained to represent indigent defendants. Accordingly, this Court granted LDA's motion to file a brief as amicus curiae in this case. *See* Order in Addendum A.

### **SUMMARY OF THE ARGUMENT**

Requiring LDA to either foot the bill for the added cost of experts and investigators or act as co-counsel with privately retained counsel is not required by LDA's contract, and would rapidly deplete LDA's lean budget, be time consuming and inefficient, and raise ethical and practical problems for LDA lawyers. Court appointed counsel is available to represent the defendant in this case, but the defendant has chosen to proceed with retained counsel. Allowing retained counsel to access LDA's investigators and funds for retaining experts is not only not required by contract, but also unworkable since the retained lawyers would not be subject to LDA's internal policies and limitations, and LDA would not have oversight or the ability to assess or limit the use of resources so as to ensure that its finite resources are used for the benefit of all of its clients.

Ordering LDA to act as co-counsel with retained lawyers likewise does not present a workable alternative. Such an approach would result in the unequal application of resources since defendants who have the resources available to retain counsel and who

have chosen to do so would have two lawyers rather than one. LDA lawyers appointed to the case would not be mere conduits for private counsel's receipt of resources and instead would have an ethical obligation to establish a relationship with the client, communicate with the client, and proceed with the case just as he or she does in any other case.

Because retained counsel is not subject to LDA's administration, any differences in approach between retained counsel and the LDA attorney could cause ethical dilemmas and require extensive expenditures of time. Additionally, because indigent defendants who have retained counsel have specifically chosen not to be represented by an LDA lawyer, forcing the client to accept LDA representation would create an untenable position for LDA lawyers who must maintain a relationship with and advise such clients. Moreover, retained counsel could insist that investigators give their cases priority and do things that may not be needed or warranted and likewise insist on expert assistance regardless of whether such an approach impacts significantly on the case.

Finally, private lawyers who agree to represent a criminal defendant and accept a fee for their representation should structure their fee agreements to provide for investigators and experts needed to ethically carry out their representation. Allowing private lawyers to structure their fee agreements without taking into account the costs of defending the case could create a windfall situation where private counsel receives a sizeable fee, but the county is left to bear the costs of providing the defendant with the basic tools for an adequate defense.



## ARGUMENT

**POINT. WHILE DUE PROCESS REQUIRES THAT THE STATE AND COUNTY PROVIDE INDIGENT DEFENDANTS WITH THE BASIC TOOLS FOR AN ADEQUATE DEFENSE, IT DOES NOT REQUIRE LDA TO FOOT THE BILL, SUPPLY RESOURCES USED BY RETAINED COUNSEL, OR APPEAR WITH RETAINED COUNSEL AS CO-COUNSEL.**

Due process requires that criminal defendants have “[m]eaningful access to justice,” and that “when a State brings its judicial power to bear on an individual defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.” *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985). In order to ensure that indigent defendants have “an adequate opportunity to present their claims fairly within the adversary system,” the United States Supreme Court requires that indigent defendants be provided the “basic tools of an adequate defense.” *Id.* at 77 (further citation omitted). States must provide for the basic tools of an adequate defense by making available and paying for investigators and expert witnesses in criminal cases involving indigent defendants in circumstances where the use of such tools “is likely to be a significant factor at trial.” *See id.* at 74, 83.

The issue in the cases before the Court is not whether the State has the obligation to provide the basic tools of an adequate defense, but instead, whether the State has taken care of its obligation by providing that, in an absence of a compelling reason to proceed outside LDA, indigent defendants can be fully represented if they accept the appointment of LDA. Stated another way, the issue is whether defendants who exercise their right to counsel of choice by choosing to proceed with private counsel rather than LDA, can

nevertheless assert their indigent status and require the county to pay for the other tools needed for an adequate defense, in the absence of a compelling reason.

While the county and individual defendants who are represented by private counsel have argued their respective positions, LDA has information that can impact on this Court's decision. Additionally, LDA has an interest in not being required to pay the costs of retaining experts and investigators for persons who are represented by private counsel. LDA also has an interest in not being placed in the untenable position of being forced to act as co-counsel with private attorneys, thereby sucking additional precious resources from LDA's budget if it were required to work with and sometimes train private lawyers who proceed with a case independently from LDA's guidelines and oversight. As a bottom line, LDA has an interest in continuing to ensure that it is able to provide adequate representation to the numerous indigent defendants appointed to its office who do not have private counsel and who rely on LDA attorneys and the lean budget provided to the office in order to present an adequate defense in their cases.

- A. LDA's internal procedures screen and limit the use of investigators and experts, thereby ensuring that indigent defendants receive an adequate defense while also preserving resources; allowing retained counsel to access LDA's resources without oversight could deplete LDA's resources and deprive indigent defendants who proceed with appointed counsel.

As a starting place, LDA or conflict appointed counsel is available to appear as counsel in all of these cases. In Salt Lake County cases where an indigent defendant requests appointment of counsel, Third District judges appoint LDA based on LDA's contract with the county. *See* contract in Addendum B. The LDA Director then assigns counsel to the case based on an internal system that takes into account experience,

expertise, schedule, and a number of other factors.

If a conflict exists between the defendant and LDA, LDA conflicts out of the case and one of the lawyers on the next available conflict team enters an appearance. The conflict teams are screened and selected by the Third District judges and are comprised of teams of two attorneys with experience in criminal cases; the Third District court judges selected six conflict trial teams and three conflict appellate teams for the 2009 and 2010 calendar years. Conflict attorneys contract with Salt Lake County, and litigation expenses, which include the costs of investigation and experts, are paid from a fund that is separate from the LDA litigation expense fund. The litigation expense fund for conflicts attorneys has remained the same since 2008 at \$45,000.

During the calendar year for 2009, LDA attorneys represented 7,995 state defendants. The four investigators and four investigative aids employed by LDA were responsible for investigation, interpreting, filing, serving subpoenas, any tasks requiring a runner, and all other tasks associated with the investigative aspect of a criminal case for those 7,995 defendants.

In addition, LDA's contract with the County provided \$340,000 to cover all litigation expenses for those 7,995 state defendants. Litigation expenses include the costs of retaining experts, witness fees, costs of exhibits, costs for receiving medical records and reports, costs for medical evaluations and psychosexual evaluations, travel expenses for investigators, and all other costs associated with litigation. While some cases require little or no expenditure of litigation funds, other cases require extensive expenditures; the \$340,000 amount extends to the twelve open and active capital homicide cases that have

not yet gone to trial, a capital homicide case with a death sentence that is on appeal, and all other cases appointed to LDA.

Each LDA attorney is assigned to an investigator. Because LDA employs roughly seventy trial and appellate attorneys, this means that each investigator works with about thirteen to sixteen trial attorneys. When an LDA attorney needs investigation, he or she submits an investigation request to the assigned investigator. That investigator prioritizes work based on a number of factors including the seriousness of the case, the timing of the trial, the timing of any significant hearings, and any other relevant factors. Investigation assistance is a necessary and limited resource in the office of LDA.

Some of the private attorneys seeking additional resources for their clients have asked that LDA investigators be assigned to their cases. Aside from the limited nature of the investigation resource, such an approach creates a burdensome, impractical, and unworkable situation. Third parties who do not operate within the office structure cannot direct and supervise LDA investigators nor prioritize their work. Such an approach would create an administrative impossibility for LDA administrators who, if ordered to provide investigative resources to private counsel, presumably would not be in a position to deny priority to a request or to consider whether the requested investigation would play a significant role in the defense. Defendants who retained private counsel but were using LDA investigative resources would receive more in the way of resources than the indigent defendants represented by the office since there would be no oversight to the requests and they may well take priority over LDA work. Moreover, retaining independent investigators at the going rate of about \$65 per hour, if LDA were forced to

do so, could quickly eat up LDA's litigation budget, thereby depriving indigent defendants proceeding with court-appointed counsel of those funds.

LDA's concern that our very limited resources which ordinarily are used for people with no resources will be tapped and depleted for use by people with resources sufficient to hire an attorney extends beyond investigative costs to the use of experts. Although LDA's contract does not require it to foot the bill for resources used by retained lawyers and was based on projected caseload for appointed cases, at least one Third District court judge has ordered LDA to pay the costs of an expert where a defendant has retained private counsel. *See Salt Lake Legal Defender Association v. Judge Atherton*, District Court Case No. 081905753, Supreme Court Case No. 20100066-SC. LDA has filed a petition for extraordinary relief before this Court asking that the order be vacated. *See id.*

LDA has an internal system that allows us to objectively assess the propriety of the use and amount of litigation funds, and to provide constitutionally adequate representation while also keeping a lid on costs. When an LDA attorney seeks the use of an expert or otherwise requests the use of litigation funds, he or she submits a request to the Director. That request explains how the requested defense resource would impact on the case, why the resource is needed, and otherwise outlines why the attorney believes that the expert or other resource would play a significant role in the case. For all non-routine requests, the Director meets with the attorney and discusses the details of the case and the necessity of using the expert or other defense resource. Before actually retaining an expert or using another defense resource, the attorney must obtain the authorization of

the Director.

Any authorization of the use of an expert or other defense resource necessarily includes obtaining an authorization as to cost. In most cases, the Director will authorize payment up to a certain amount; if that amount is exceeded, the issue must be revisited.

LDA does not have experts on retainer and does not pay any expert until a bill is submitted for work that has been completed. While there is no “expert list” of experts on retainer, LDA does contract on a case by case basis with various experts, some of whom do a significant amount of work for the office when requested on individual cases to do so. Those experts at times discount their usual rate in recognition of the fact that the lawyers are public defenders who are not receiving a fee for the case. Experts also, on occasion, forgive a portion of the bill, especially when they exceed the agreed amount, again recognizing the limited resources of the office.

Requiring LDA to provide experts and other resources to defendants who are represented by private counsel creates an impossible situation that would quickly deplete LDA funds and result in unequal and lesser treatment for the defendants with no resources who are represented by LDA. Trial judges who are assessing these requests do not second guess the private attorneys making the request and do not subject the cases to the scrutiny used by LDA to determine whether the requested resource will play a significant role in the defense. *See Ake*, 470 U.S. at 77, 83 (holding that State must provide experts and basic tools for an adequate defense where such resources would play a significant role in the defense). In addition, experts are less likely to negotiate lower rates for private counsel or be willing to limit the cost in circumstances where private

counsel has received a sometimes very sizeable fee.

Nor will LDA be able to deny requests, even if it is evident that the expert or other resource will have no impact on the case. Private lawyers, regardless of how much experience they have, will have no oversight and the freedom to run up extensive bills without concern for working within the LDA system. While under the current approach, LDA is able to adequately fund all needed experts and other defense resources, requiring LDA to fund experts for private lawyers would rapidly deplete LDA's litigation budget and undermine the Due Process requirement that the indigent defendants appointed to the office for representation have access to the basic tools of a defense.

LDA's budget is based on a history of funding that corresponds to the number of cases appointed to the office for representation. While historically private defense lawyers did not agree to be retained unless the fee covered all defense expenses, the recent surge in requests for investigative and expert support despite the payment of sometimes sizeable fees, would create an additional and unmanageable load on LDA's limited resources. In the end, indigent defendants who have no resources at all, let alone the ability to retain counsel, would be deprived.

B. Requiring LDA to appear as co-counsel in cases where a defendant has retained counsel would drain resources, create ethical and practical problems for LDA lawyers, and result in unequal and greater access to resources for defendants represented by private counsel.

Appointing LDA as co-counsel does not solve the problem created by private counsel who are attempting to obtain additional resources for their clients. Such an approach necessarily results in an unequal application of resources since defendants who

retained private counsel would then have two lawyers, even in routine cases – an LDA lawyer and a private lawyer. Additionally, because private counsel would not be subject to the internal administration of LDA, appointing LDA as co-counsel with retained private lawyers would not solve LDA’s concerns about limiting the use of defense resources. Moreover, appointing LDA lawyers as co-counsel could create ethical and practical problems for LDA attorneys and result in LDA acting as a training ground for inexperienced lawyers. In the end, because neither the LDA attorney nor the retained attorney would have the final say, such an approach would be time consuming and expensive.

LDA has a long history of refusing to appear as co-counsel with private lawyers. The rationale for such a position is based on many factors, including, among other things: (1) indigent defendants with private counsel do not need an additional attorney and would receive greater resources than their indigent counterparts if two attorneys appeared on their case; (2) LDA lawyers can adequately represent defendants and if a defendant wishes to exercise his right to choose a private lawyer, he has rejected LDA and its resources; (3) working with lawyers outside the office could raise ethical and practical problems where lawyers do not agree as to how to proceed, and (4) LDA does not have the resources to train lawyers not employed by the office. Additionally, as outlined above, private lawyers would not be subject to LDA’s internal guidelines for the use of resources and would deplete LDA’s resources by insisting on immediate investigative support or the use of experts in cases that do not require or warrant such support. Moreover, if appointed as co-counsel, LDA attorneys would have an ethical, statutory,



and constitutional obligation to fully represent the client, and would not be able to act as just a “straw-attorney” for the pass through of resources.

Appointing LDA as co-counsel with private attorneys would be disruptive, inefficient, time consuming and costly, and would raise ethical issues for LDA attorneys. LDA has an internal system for handling disagreements about how to proceed, and administrative personnel are available to resolve issues should co-counsel have a significant disagreement in those few cases where two lawyers represent a defendant. Requiring LDA lawyers to work with outside counsel who may approach the case differently and may not be competent requires extensive time and would result in an untenable situation where lawyers disagreed about approach. Since private lawyers are not subject to LDA’s control and screening, issues as to who decides how to proceed and what resources to use would arise in these cases and be difficult if not impossible to resolve.

Having outside counsel on a case also undermines our ability to establish a relationship with our client and would make difficult cases even more difficult due to an inability to work closely with the client. In fact, both the private lawyer and the LDA attorney would have an ethical and statutory obligation to establish a relationship with the client (*see* Utah R. Prof’l Conduct 1.4; Utah Code Ann. § 77-32-304(1)(a) (2008)); the client, having retained counsel, might not want a relationship with the LDA attorney or might attempt to triangulate the two lawyers or otherwise make the LDA attorney’s representation much more difficult and time consuming than in cases that do not involve private counsel. And, in circumstances where the private lawyer has disparaged LDA’s

capabilities as a means of convincing the defendant to retain counsel, the appointed lawyer would have a difficult time maintaining a professional relationship with the client.

In addition, LDA attorneys as well as the retained lawyers have an ethical obligation to advise the defendant; compliance with this requirement would at least be duplicative, and in many cases would be more difficult and time consuming, especially when the lawyers do not see the case in the same way. And, forcing LDA lawyers to act as co-counsel in cases where the other lawyer has been paid flies in the face of Rule 1.5 of the Utah Rules of Professional Conduct, which precludes the division of a fee “between lawyers who are not in the same firm” unless “the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;” “the client agrees to the arrangement, including the share each lawyer will receive, and the arrangement is confirmed in writing;” and “the total fee is reasonable.” Utah R. Prof’l Conduct 1.5(e).

Moreover, LDA would become a training ground for inexperienced lawyers who seek an appointment as co-counsel with LDA lawyers so as to benefit from LDA’s experience in representing criminal defendants. This is especially true in the current economic climate where more lawyers are entering private practice as sole practitioners immediately after law school. While historically, a few lawyers have asked to appear with LDA as co-counsel so as to learn from LDA lawyers, LDA has resisted those requests for the reasons outlined above. Being forced to work with and train inexperienced lawyers would be a further drain on LDA’s limited resources.

Appointing LDA as co-counsel with private counsel so as to make LDA’s

resources available raises additional concerns that could impact negatively on LDA and its ability to provide adequate representation to the many indigent defendants it represents. LDA should not be required to share confidential and proprietary information about the office with persons who are not employed by the office, trained by the office, or subject to the office's oversight. LDA is a private agency that contracts with Salt Lake County to provide representation to indigent defendants – it is not a state agency that is required to assume the obligations of the State and county. LDA attorneys have worked hard for many years to establish a respected public defender office that provides quality representation despite limited resources. Requiring our lawyers to expend additional resources and deal with the increased pressure, frustration, and time commitment caused by working with lawyers outside the office could undermine the office's ability to adequately represent its other clients.

Allowing private counsel to receive a fee and then act as co-counsel with LDA could also result in a significantly higher number of indigent cases. If a lawyer's fee takes all of a defendant's money, that defendant is rendered indigent. Rather than naming a fee that will cover the entire scope of representation, as required by ethical rules, lawyers would be free to charge that same amount but exclude the cost of experts and investigation, then request county funds. Requiring LDA to act as co-counsel in such cases could actually increase the number of indigent cases, perhaps without additional funding from the county, since defendants who have historically opted for private counsel will in many cases choose to continue with private counsel but also accept the benefits of their indigent status by receiving expert and investigative assistance paid for with county

funds. Once private counsel agrees to accept a case, they have an ethical obligation to fully represent the defendant; it should not be the burden of the county or LDA to bail private lawyers out of bad economic decisions made at the time they accepted a case.

Utah's statutes do not provide for or require a private entity like LDA to appear as co-counsel with lawyers not employed by the office. Instead, Utah's statutory scheme allows an entity such as LDA to contract with a county to provide representation to indigent defendants. *See* Utah Code Ann. § 77-32-201 (2008). That representation includes the appointment of counsel as well as the provision of defense resources where the use of such resources would be a significant factor in the defense. *See Ake*, 470 U.S. at 83. As Salt Lake County points out, the most recent version of the statute was passed in an attempt to link defense resources to the appointment of counsel in the aftermath of this Court's decision in *State v. Burns*, 4 P.3d 795, 2000 UT 56. *See* Salt Lake County Br. 14-15 (citing legislative history); Utah Code Ann. § 77-32-301 (2008) (linking right to adequate defense resources with appointment of counsel); Utah Code Ann. § 77-32-302(1)(b) & (2) (2008) (same). Such an approach arguably provides indigent defendants the basic tools for an adequate defense should they choose to reject private counsel and be represented by the public defender.

As a final matter, the parties' claim that denying resources to private counsel would have a chilling effect on pro bono representation is without merit. First, as the county points out, this claim was never raised below. Second, and perhaps more importantly, none of the cases before the Court involve pro bono representation. In cases where a private lawyer receives a fee, that fee arguably should be considered in assessing

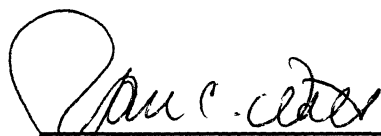
whether further resources are required. As an extreme example, a lawyer who accepts a fee of \$100,000 for a simple case would receive a windfall by structuring the fee agreement to provide that other defense costs will be paid by the county. A better approach in such circumstances would be to require defense lawyers to include defense resources when setting a fee, regardless of whether the defendant or relatives pay, thereby recognizing that when a defense lawyer commits to a case, he is ethically required to commit to a full defense. *See* Utah R. Prof'l Conduct 1.2 (indicating “[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation”); Utah R. Prof'l Conduct 1.5 (implying that expenses should be included in fee and communicated to client).

On the other hand, in those cases where a criminal defense lawyer appears pro bono, Rule 15 of the Utah Rules of Criminal Procedure applies and requires the county to pay the costs of experts. Additionally, a lawyer appearing pro bono can negotiate with investigators and experts for lower fees, pointing out that he or she is working for free. Hence, while this issue is not before the Court in this case, it nevertheless should be noted precluding defense lawyers from accepting a fee that does not cover the costs of an entire defense would not have a chilling effect on pro bono representation.

### **CONCLUSION**

Salt Lake Legal Defender Association respectfully requests that regardless of the outcome of this appeal, this Court recognize the issue before it should not be resolved by requiring the public defender to pay the added costs for investigators and expert witnesses or act as co-counsel in cases where a defendant has retained private counsel.

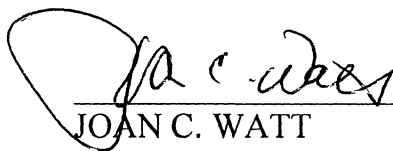
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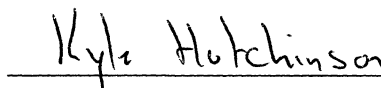
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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and nine copies of the foregoing to the Utah Supreme Court, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and mailed, postage pre-paid two copies to Donald Hansen, Salt Lake County Attorney's Office, 2001 South State Street, #S3600, Salt lake City, Utah 84190-1200, and Sean Druyon, Druyon Law Offices, 503 West 2600 South Ste. 200, Bountiful, Utah 84010, and a courtesy copy to Laura DuPaix, Utah Attorney General's Office, 160 East 300 South, Sixth Floor, Salt Lake City, Utah 84114-0854 and William McGuire, Davis County Attorney's office, 800 West State Street, Farmington, Utah 84025, this 3 day of November, 2010.

  
JOAN C. WATT

DELIVERED/MAILED as indicated above this 3 day of November, 2010.



Tab A

FILED  
UTAH APPELLATE COURTS  
FEB 10 2010

IN THE SUPREME COURT OF THE STATE OF UTAH

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The State of Utah,

Appellant,

v.

Case No. 20090816-SC

Antony Davis,

Appellee.

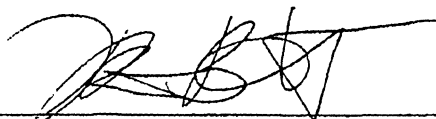
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ORDER

This matter is before the Court on motion to accept brief of amicus curiae, submitted by the Salt Lake Legal Defender Association. The motion is granted. The amicus brief shall be submitted within seven days after the timely submission of Appellee's brief. The time for Appellant's reply brief, if any, shall run from service of the amicus brief. See Utah R. App. P. 25 & 26(a). Additionally, Appellee shall be permitted to file a reply brief, if he so desires, for the sole purpose of responding to the amicus brief, with the time also running from service of the amicus brief.

FOR THE COURT:

2-10-10  
Date

  
Matthew B. Durrant  
Associate Chief Justice



CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2010, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

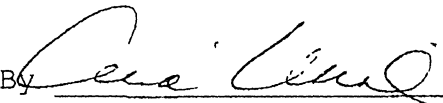
T J TSAKALOS  
SALT LAKE COUNTY ATTORNEY'S OFFICE  
2001 S STATE ST S 3600  
SALT LAKE CITY UT 84190-1200

JOAN C. WATT  
PATRICK L ANDERSON  
SALT LAKE LEGAL DEFENDER ASSOCIATION  
424 E 500 S STE 300  
SALT LAKE CITY UT 84111

LAURA B DUPAIX  
ASSISTANT ATTORNEY GENERAL  
160 E 300 S 6TH FL BX 0854  
PO BOX 140854  
SALT LAKE CITY UT 84114-0854

SEAN B DRUYON  
DRUYON LAW OFFICES PC  
503 W 2600 S STE 200  
BOUNTIFUL UT 84010

Dated this February 11, 2010.

By   
Judicial Assistant

Case No. 20090816  
District Court No. 091900484

Tab B

County Contract # SG040120  
District Attorney #2004-1644

AGREEMENT FOR SERVICES

THIS AGREEMENT is made and entered into this 28 day of December 2004, by and between SALT LAKE COUNTY, a body corporate and politic of the state of Utah hereinafter referred to as "COUNTY", and SALT LAKE LEGAL DEFENDER ASSOCIATION, a non-profit corporation of the state of Utah, hereinafter referred to as "LEGAL DEFENDERS"

W I T N E S S E T H

WHEREAS, the Legislature of the state of Utah in 1981 enacted Title 77, Chapter 32, Utah Code Annotated 1953, as amended, entitled "Indigent Defense Act" which Act sets minimum standards for the defense of persons charged with crimes who face the possibility of deprivation of liberty within the state, who are legally indigent and financially unable to obtain an adequate defense thereof, and

WHEREAS, Utah Code Ann § 77-32 306, (1953 as amended), allows COUNTY to provide the legal services prescribed by the Act through non-profit legal aid associations, and

WHEREAS, SALT LAKE COUNTY Ordinance Section 2 76 010 et seq provides that COUNTY shall discharge its obligation to provide legal counsel and investigators and defense support services to indigent defendants by contracting yearly with SALT LAKE LEGAL DEFENDERS ASSOCIATION

WHEREAS, LEGAL DEFENDERS has been established and is able to provide legal representation for indigent defendants as provided by law

NOW, THEREFORE, the parties hereto agree as follows

1. CONSIDERATION

A. COUNTY does hereby engage LEGAL DEFENDERS to perform the services recited and set forth herein and to pay to LEGAL DEFENDERS for said services the sum of \$7,461,195.00 for the period of January 1, 2005 through December 31, 2005. The money shall be made available in two payments according to terms and conditions of this agreement as follows:

\$3,730,597.50 to be advanced on or before January 15, 2005; and

\$3,730,592.50 to be advanced on or before July 1, 2005.

B. It is understood and agreed that the maximum total cost of this agreement, excluding the provisions of paragraphs 2B in regard to habeas corpus, and 4 and 5 below, shall not exceed \$7,461,195.00. Said total cost shall be inclusive of all professional fees and expenses that may be incurred by LEGAL DEFENDERS. Costs for transcripts and reporter services on appeal or in other cases shall be borne by LEGAL DEFENDERS at no additional charge to COUNTY.

C. LEGAL DEFENDERS agree to submit a written invoice to COUNTY's Contract Manager at least thirty (30) days prior to the date of the next semi-annual payment date and following the receipt of said invoice by COUNTY, said payment may be processed by COUNTY.

2. SERVICES TO BE RENDERED

A. LEGAL DEFENDERS shall perform the legal services required hereunder in a professional and ethical manner under guidelines and standards as set forth in the Rules of Professional Conduct, Canons of Judicial Conduct, and other such regulations and statutes as shall govern the practice of law in the state of Utah together with such other regulations or

statutory provisions to which LEGAL DEFENDERS may be subject as a result of federal law

B. (1) LEGAL DEFENDERS agree to provide legal advice and representation at all stages of the proceedings, to indigent persons entitled thereto as indicated in this agreement after appointment by a Judge of the Justice Court of Salt Lake County, the District Court of Salt Lake County, or the Court of Appeals, or by a Justice of the Supreme Court of Utah, provided the person is charged under the laws of the State of Utah with a felony, misdemeanor, or probation violation for any offense committed in Salt Lake County, or is seeking a first right of appeal to the District Court, Court of Appeals, or Supreme Court of the State of Utah pursuant to the provisions of the Utah Code Ann. § 77-32-301. LEGAL DEFENDERS agree to provide the aforementioned service with respect to each and every indigent person entitled thereto after court appointment, except in those cases where, as defined herein, a legal conflict of interest exists such as would preclude counsel from rendering his undivided loyalty to the client as provided in Utah Code Ann. § 77-32-301, et seq.

(2) LEGAL DEFENDERS further agrees to provide legal advise and representation to all indigent persons entitled thereto who are seeking a writ of habeas corpus to obtain release from the Salt Lake County Jail and, accordingly, LEGAL DEFENDERS need not obtain court appointment prior to or as a condition of providing such legal advice and services notwithstanding any other provision of this agreement. The parties agree that the consideration paid the LEGAL DEFENDERS under paragraph 1 or the amount of the Conflicts Fund under paragraph 4 may be increased by such amount as will be reasonably necessary to provide habeas corpus services

C LEGAL DEFENDERS agree that there shall be no representation of a person by

LEGAL DEFENDERS prior to an actual court appointment or otherwise outside the terms of this agreement.

D. LEGAL DEFENDERS agree to submit itemized quarterly reports reflecting:

(1) New Cases Received During Quarter

- a. Felony
- b. Misdemeanor, State Offenses
- c. City and County Ordinance Misdemeanor
- d. Appeals

(2) Total Pending Cases -- each category above

(3) Total Cases Closed During the Quarter -- Disposition

- a. Trial
- b. Plea
- c. Dismissal

(4) Full-time equivalent attorneys working during the quarter assigned to felony, misdemeanor, city ordinances and appeals.

(5) Number of conflict-of-interest cases referred during the quarter and reason for the referral.

(6) Actual court appointments of LEGAL DEFENDERS made during the quarter, listing the date and time of each appointment.

E. LEGAL DEFENDERS agree, upon reasonable notice, to allow COUNTY access to books and records for the purpose of auditing LEGAL DEFENDERS' use of public funds.

This does not apply to confidential client files.

3. CONFLICT OF INTEREST

A. A conflict-of-interest, such as would allow LEGAL DEFENDERS to withdraw pursuant to this agreement, must be of such a nature as to be proscribed by case law, statute, or the Rules of Professional Conduct. It is agreed by the parties that a conflict-of-interest does not include withdrawals occasioned by defendant's request for counsel of his choice or disagreements with or dislikes of appointed counsel. It is further agreed that any withdrawals from clients for other than an actual legal conflict-of-interest will require LEGAL DEFENDERS to pay for additionally-appointed counsel from the sum of money provided by COUNTY in paragraph 4.

B. LEGAL DEFENDERS further agree that if, in their opinion, such a conflict exists, the facts and circumstances so far as practicable, without disclosing confidences, will be presented, after notice has been given to the Salt Lake County District Attorney's Office and to the appropriate judge who has jurisdiction over the case for determination as to whether such a conflict, in fact, exists. If such court concludes that there is, in fact, a conflict-of-interest, LEGAL DEFENDERS will be relieved of the responsibility of providing legal advice and representation for such defendant, except as otherwise provided for in this agreement.

#### 4. CONFLICTS FUND

COUNTY also agrees to pay LEGAL DEFENDERS the sum of \$458,700.00 for payment of costs and representation of defendants when non-LEGAL DEFENDERS attorneys are appointed to represent defendants in conflict-of-interest cases as defined herein. Any amount required to be expended above that sum for conflict-of-interest cases shall be paid from the sum provided LEGAL DEFENDERS in paragraph 1. LEGAL DEFENDERS shall pay for conflict-of-interest counsel only after a court order allowing withdrawal of LEGAL DEFENDERS and appointment of conflict counsel. Payments shall be made to appointed counsel or counsel

retained on a contract to do conflict-of-interest cases pursuant to that contract. Appointment of counsel for conflict-of-interest on capital murder cases is excluded from this agreement to the extent that the above budget figure is exceeded. Any amount remaining in the conflict-of-interest account to be maintained by LEGAL DEFENDERS, after the payment of all legal fees and associated costs resulting from the appointment of conflicts counsel incurred during the calendar year, shall become the sole and exclusive property of LEGAL DEFENDERS. The sum shall be paid semi-annually as follows:

\$229,350.00 to be on or before January 15, 2005; and

\$229,350.00 to be advanced on or before July 1, 2005.

5. OUT-OF-STATE WITNESSES

A. COUNTY agrees to reimburse LEGAL DEFENDERS for actual expenses incurred by LEGAL DEFENDERS in transporting out-of-state witnesses to the state of Utah to attend and testify at a criminal trial where such attendance is obtained in accordance with the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Sections 77-21-1 et seq., Utah Code Annotated 1953, as amended. Notice shall be submitted to the Salt Lake County District Attorney advising of the time and place of the court hearings for approval of the need for the witness and expenses associated with securing the attendance of the witness, sufficient to provide COUNTY the opportunity to oppose the requested witness or expenses as appropriate. No funds shall be transmitted until after reasonable documentation has been submitted and approved by the Salt Lake County Auditor, such documentation to include a copy of the court order or certificate approving the need for the witness and a copy of the court's approval of the expenses.

B. COUNTY agrees to provide \$15,000.00 to cover expenses incurred in



transporting out-of-state witnesses or for other extraordinary expenses. The Contract Manager is empowered to approve expenses exceeding \$15,000 00 for good cause shown, subject to appropriate adjustments to the budget allocation by Salt Lake County. Application for reimbursements from this amount shall be as provided in paragraph 5.A. for out-of-state witnesses or with such documentation as COUNTY may request for other extraordinary expenses.

6. AFFIDAVIT OF INDIGENCY

LEGAL DEFENDERS shall cooperate with the courts to obtain an affidavit from the individual defendant averring his/her inability to pay for private counsel. The affidavit shall comply with the requirements of Utah Code Ann. § 77-32-202 (1953, as amended). LEGAL DEFENDERS agree that they shall not act in a case until the court has issued its order of appointment. LEGAL DEFENDERS further agree to provide information to the court and the Criminal Justice Services Division of Salt Lake County concerning any changes with regard to the indigency status of a defendant which changes would affect the qualifying of the defendant for court-appointed counsel. LEGAL DEFENDERS also agree to assist the courts and the Salt Lake County District Attorney's Office in providing information necessary to recover costs pursuant to Utah Code Ann. § 77-32-202(6), including maintaining individual case records which reflect costs and types of services as ordered by the court.

7. CONTRACT MANAGER

It is agreed that the responsible party representing COUNTY in the administration and management of this agreement shall be the Chief Administrative Officer or designee, herein referred to as "Contract Manager".

8. SALARY SCALE

LEGAL DEFENDERS agree to maintain a salary scale, insofar as possible, comparable to salaries of state or COUNTY legal officers in Salt Lake COUNTY with such increases as may be required, subject to the restriction that lawyers of LEGAL DEFENDERS will not engage in private practice and shall not represent clients in any civil action against COUNTY or participate in or receive any financial remuneration from any source as a result of any civil action against COUNTY.

9. LEGAL DEFENDERS ASSOCIATION BUDGET

LEGAL DEFENDERS shall prepare a budget and apply the funds received from the COUNTY toward payment of the operating costs (salaries and overhead), on a pro rata basis, which are incurred during the 365-day period as is set forth in LEGAL DEFENDERS' BUDGET, which shall be formally approved by the COUNTY for fiscal year 2005 and yearly thereafter.

10. TERM OF CONTRACT

The parties agree that the term hereof shall extend for the period set out in paragraph 1, but that said term is automatically extended yearly unless terminated as provided in Section 12 below. For each yearly extension LEGAL DEFENDERS shall submit yearly budgets as provided herein. The COUNTY's annual appropriation shall be determined yearly at the time the COUNTY adopts its budget.

11. RESOURCE COMMITMENT

LEGAL DEFENDERS agree that, for the period of this agreement, it will dedicate attorney resources at least equivalent to that set forth in its yearly LEGAL DEFENDER'S BUDGET, approved by COUNTY. LEGAL DEFENDERS, during the contract period, shall retain the numbers of attorneys and other staff as indicated in that BUDGET. LEGAL DEFENDERS will not use COUNTY funds to finance or support legal defense services for any

other governmental entities

12. TERMINATION

The parties agree that either party shall have the right at any time after the effective date of this contract to terminate this agreement by giving the other party six (6) months notice in writing by registered mail, return receipt requested, specifying the reason or reasons therefor. If notice is so given, this agreement shall terminate upon the expiration of the six (6) months and the liability of the parties hereunder for the further performance of the terms of this agreement shall thereupon cease, but neither party shall be relieved of the duty to perform their obligations up to the date of termination. In the event of termination, the number of calendar days from and including January 1 to the date of termination shall be computed and prorated into the total contract amount. Any funds previously advanced by COUNTY in excess of the amount computed by the above formula shall be returned to COUNTY within 60 days of the date of termination.

13. NON-FUNDING CLAUSE

It is understood and agreed by the parties hereto that funds are not presently available for performance of this agreement by COUNTY. COUNTY's obligation for performance of this agreement is contingent upon funds being appropriated for payments due under this agreement. In the event no funds or insufficient funds are appropriated and budgeted in any fiscal year by COUNTY for payments due under this agreement, for the current or any succeeding fiscal year, this agreement shall create no obligation on COUNTY as to such current or succeeding fiscal years and shall terminate and become null and void on the last day of the fiscal year for which funds were budgeted and appropriated, or, in the event of a reduction in appropriations, on the last day before the reduction becomes effective, except as to those portions or payments herein

then agreed upon for which funds shall have been appropriated and budgeted. Said termination shall not be construed as a breach of or default under this agreement and said termination shall be without penalty, additional payments, or other expense to COUNTY of any kind whatsoever, and no right of action for damages or other relief shall accrue to the benefit of LEGAL DEFENDERS, its successors or assigns, as to this agreement, or any portion thereof, which may so terminate and become null and void.

14. ASSIGNMENT

LEGAL DEFENDERS may not assign or transfer its performance of the agreement, any interest therein, or claim thereunder without the prior written approval of COUNTY.

15. INDEPENDENT CONTRACTOR

LEGAL DEFENDERS agree that it is an independent contractor and that its officers and employees shall not be considered employees or officers of COUNTY nor entitled to any employee benefits as COUNTY employees as a result of the execution of the agreement.

16. INDEMNIFICATION AND INSURANCE

A. LEGAL DEFENDERS shall indemnify COUNTY, its officers and employees against liability for any claim, injury or damage caused by any negligent act or omission of any of LEGAL DEFENDERS' officers, employees, volunteers or agents in the performance of the agreement and shall hold COUNTY harmless from any loss occasioned as a result of the performance of the contract by LEGAL DEFENDERS.

B. LEGAL DEFENDERS agree to maintain such insurance as will fully protect both LEGAL DEFENDERS and COUNTY from any and all claims under the Worker's Compensation Act, from any and all other claims of whatsoever kind or nature for the damage to property or for

personal injury, including death, made by anyone whomsoever, that may arise from operations carried on under this agreement, and from any and all claims of malpractice, including civil rights violations under, but not limited to, Section 1983 of the Federal Civil Rights Act. LEGAL DEFENDERS agree to provide COUNTY with certificates evidencing the required coverage before LEGAL DEFENDERS begin work hereunder and which are attached as part of this agreement. Such insurance shall be provided at LEGAL DEFENDERS' own cost and expense and shall name COUNTY as an additional named insured.

17. NO OFFICER OR EMPLOYEE INTEREST

No officer or employee of COUNTY shall have any pecuniary interest, direct or indirect, in the agreement or the proceeds thereof. No officer or employee of LEGAL DEFENDERS nor any member of their families shall serve on a COUNTY board or committee or hold any such position which either by rule, practice or action nominates, recommends, or supervises LEGAL DEFENDERS' operations, or authorized funding to LEGAL DEFENDERS.

18. MODIFICATION OF CONTRACT

No alteration or variation of the terms of the agreement shall be valid unless made in writing and signed by the parties thereto.

19. DEFAULT

If either party defaults in the performance of the agreement or any of its covenants, terms, conditions, or provisions, the defaulting party shall pay all costs and expenses including a reasonable attorney's fee, which may arise or accrue from enforcing the agreement or from pursuing any remedy provided thereunder.

20. DISCRIMINATION

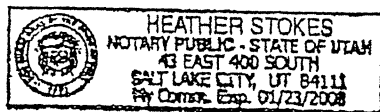


SALT LAKE LEGAL DEFENDER  
ASSOCIATION

By: *Robert Athay*  
Chairman  
Board of Directors

STATE OF UTAH                    )  
  ss.  
COUNTY OF SALT LAKE    )

On the 17 day of December, 2004, personally appeared  
before me D. Gilbert Athay, who being by me duly sworn, did  
say that he is the Chairman, of Salt Lake Legal Defenders Association, a  
corporation, and that the foregoing instrument was signed in behalf of said corporation by  
authority of its Board of Directors, and he acknowledged to me that said corporation executed the  
same.



*Heather Stokes*  
NOTARY PUBLIC  
Residing in Salt Lake County, State of Utah

(SEAL)